Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-897

EUGENE ENSLIN,

Petitioner,

—v.—

THE STATE OF NORTH CAROLINA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

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IN THE
SUPREME COURT OF THE UNITED STATES

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No. _____

EUGENE ENSLIN,

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THE STATE OF NORTH CAROLINA,

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PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF NORTH CAROLINA

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of North Carolina dismissing his appeal and its concurrent order denying him review by writ of certiorari.

OPINIONS BELOW

No opinion was rendered by the Supreme Court of North Carolina. The opinion of the

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North Carolina Court of Appeals is unreported and is set forth in the Appendix, infra, pp. 3a-4a. No opinion was rendered by the Superior Court of Onslow, North Carolina.

JURISDICTION

The judgment and order of the Supreme Court of North Carolina was entered on August 25, 1975. By order dated November 20, 1975 Mr. Chief Justice Burger extended the time for filing this petition to and including December 23, 1975. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257 (3).

QUESTIONS PRESENTED

A. Whether North Carolina General Statute 14-177 violates the constitutional right of privacy guaranteed by the First, Third, Fourth, Fifth, Ninth and Fourteenth Amendments to the Constitution of the United States.

B. Whether North Carolina General Statute 14-177 violates on its face the equal protection clause of the Fourteenth Amendment.

C. Whether North Carolina General Statute 14-177 is so vague that it violates the due process clause of the Fourteenth Amendment.

D. Whether the arbitrary enforcement of North Carolina General Statute 14-177 deprived

petitioner of Due Process and Equal Protection as guaranteed by the Fourteenth Amendment to the United States Constitution.

STATUTORY PROVISION INVOLVED

General Statutes of North Carolina §14-177:

> If any person shall commit the crime against nature, with mankind or beast, he shall be guilty of a felony, and shall be fined or imprisoned in the discretion of the court.

STATEMENT OF THE CASE

Petitioner, an adult, was convicted of performing an act of oral sex, in his own home, with a consenting male adult. The indictment charged that on June 7, 1974, petitioner "unlawfully, willfully and feloniously did commit the abominable and detestable crime against nature with Herbert P. Morgan a male person." (R. 2). */ He was tried and convicted by a jury on his plea of not guilty and was sentenced to a one year term of imprisonment.

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*/ The symbol "R" refers to the transcript of the record at trial.

At trial, Detective Sam Hudson of the Jacksonville, North Carolina Police Department, testified on behalf of the prosecution. On cross-examination he stated that he had known the petitioner to be a homosexual, (R. 16), and that he therefore wished "to run [petitioner] out of town" (R.16) by contriving to have petitioner violate §14-177. He stated further that he therefore intentionally sent a seventeen year old member of the U.S. Marine Corps., Herbert P. Morgan, who was not a homosexual (R. 13), to entice petitioner into committing the act of sodomy. (R. 16). As Detective Hudson himself put it,

> This was a deliberate and planned effort on my part using this 17 year old prosecuting witness, Herbert Morgan, to set Mr. Enslin up so that I could prosecute him for homosexual conduct. (R. 17). */

Hudson further stated that he had been employed by the police department for eight years and that he had no knowledge of any other arrests for the crime against nature during those years. (R. 13,16,17).

Herbert Morgan confirmed that Detective Hudson had asked him to approach petitioner and present him with the opportunity to commit

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*/ The age of consent in the State of North Carolina is seventeen.

the crime against nature with him. He testified that Detective Hudson had asked him if he would be willing to go to the Tri-Massage Parlor, a massage parlor managed by petitioner, and give petitioner an opportunity to commit the crime against nature with him. He agreed to do so. He was given marked money to pay petitioner for his services should a request for payment be made. (R. 11, 13). On June 7, 1974, Morgan therefore went to the bookstore next to the Tri-Massage Parlor and asked for Mr. Enslin. He testified that he had never met Enslin before that date. Upon meeting Enslin in the bookstore, Morgan told Enslin that some friends of his at the base had told him to see Enslin if he was looking for a little "extra excitement." Enslin told Morgan that he was a homosexual and would give him "extra excitement." Morgan left petitioner to advise Detective Hudson of his conversation and to receive further orders. He found the detective hiding in the bushes with binoculars for the purpose of observing Morgan's and Enslin's activities.

Morgan further stated that Detective Hudson directly advised him to participate in the sex act with petitioner. (R. 11). Morgan and petitioner then went to petitioner's living quarters which was a room behind the bookstore. Once in the room, petitioner committed the act of fellatio upon Morgan. (R. 8).

On cross-examination, Morgan stated that he was an adult at the time of the act, that he consented to the sexual act, that petitioner did not use any force, nor did money change hands. (R. 11). He further stated that it was impossible for anyone to see into the room because the room had no windows and was strictly private. (R.11, 12). In fact, Detective Hudson testified that when he hid in the bushes across from the bookstore with a pair of binoculars to observe the activity of the two men, he could see the men only while they were in the bookstore with the use of the binoculars, but could not see them once they entered petitioner's room where the act was committed. (R.13, 15).

Prior to his plea of not guilty petitioner made a motion to quash the indictment based on the unconstitutionality of G.S. 14-177. A separate hearing was had on the merits of the motion to quash.

Albert D. Klassen, Jr. testified as an expert witness on behalf of petitioner, for the purpose of showing that the proscriptions of G.S. 14-177 negatively and seriously affect millions of people and that the law does not serve any legitimate purpose. Mr. Klassen is a sociological researcher on the staff of the Kinsey Institute for Sex Reasearch in Bloomington, Indiana. He is an expert on human sexuality and has conducted his own national surveys on sex research. The Kinsey Institute has the largest archives in the world

on human sexuality. Klassen testified that as part of his occupation he has familiarized himself with all the information available at the Institute on the effects and causes of homosexuality. (R. 26, 27). The court accepted Mr. Klassen as qualified to testify as a sociological researcher with a specialty in human sexuality.

Klassen testified that the act of fellatio committed by petitioner and proscribed by G.S. 14-177 is performed by a very large percentage of this country's heterosexual and homosexual population (50%-60% of heterosexuals practice oral sex; 20%-30% of heterosexuals practice anal intercourse; a majority of 35%-40% of all American males have practiced oral sex with another male). He stated that the laws prohibiting these acts are honored more in their breach and that there are few prosecutions for the acts (R. 28-33). He also testified that according to Kinsey and other statistics there are two to five million homosexuals in this country (R. 28) and that there is nothing unclean, unhealthy or unnatural about the prohibited sex acts. He testified that in fact sex counsellors advise people to perform these acts (R. 29).

Mr. Klassen stated that, contrary to myth, surveys show that homosexuals are not child molesters and their sex drive is no more uncontrollable than that of heterosexuals (R. 30). He also stated that there

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is no evidence that children or adults can be converted to homosexuality by exposure to homosexuals and that removal of criminal sanctions will not cause an increase in the numbers of homosexuals (R. 31). He found in his interviews with homosexuals that the criminal laws did not play a preventive role in stopping their activities but only led to the acts occurring in more lonely and repressive situations (R. 31).

According to the American Psychiatric Association homosexuals are not pathological and should not be subject to rehabilitation (R. 31). In any case, he testified that changing sexual orientation is painful, costly and almost impossible to accomplish (R. 32). Mr. Klassen also found it to be folly to try to "rehabilitate" a homosexual by sending him or her to prisons which are limited in their populations to members of the same sex (R. 32, 33).

Mr. Klassen testified that the National Institute of Mental Health found that there is no nexus between homosexuality and the ability to perform a job, but that homosexuals are subject to substantial employment discrimination and societal prejudice (R. 34).

Mr. Klassen stated that, according to psychiatrists, greater social acceptance is imperative for the increased mental health of homosexuals; and in fact, he

cited studies which show that suppression of sexuality in any human being, homosexual or heterosexual, is negatively correlated with mental health (R. 35).

He testified that greater acceptance of homosexuality will not undermine the institution of marriage. He found, instead, that suppression of homosexuality leads to marriage breakdowns because homosexuals are pressured into entering into marriages with heterosexuals. The marriages usually end in divorce because of sex problems (R. 35).

The state offered no evidence to support the justification for G.S. 14-177.

At the close of the hearing petitioner moved to quash the indictment and dismiss the prosecution. Petitioner had also moved for a declaration of non-suit at the close of the state's evidence and at the close of the hearing on the motion to quash. All the motions were denied. Petitioner appealed to the North Carolina Court of Appeals. The Court of Appeals affirmed the judgment of the Superior Court stating only that no error was found and that G.S. 14-177 was constitutional.

Petitioner filed a notice of appeal and a petition for a writ of certiorari from the lower courts' decisions with the Supreme Court of North Carolina. Therefore, the appeal was dismissed and the writ was denied without opinion. From these orders review is now sought.

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The North Carolina Supreme Court granted a stay of execution pending diposition of a petition for certiorari to the United States Supreme Court.

FEDERAL QUESTIONS WERE RAISED BELOW

Petitioner moved to quash the indictment on the grounds that G.S. 14-177 violates the U. S. Constitution prior to his plea of not guilty (R. 4), at the close of the state's evidence (R. 18) and at the close of the hearing on the merits of the motion to quash (R. 41). The same constitutional claims were pressed on appeal to the North Carolina Court of Appeals and the Supreme Court of North Carolina.

REASONS FOR GRANTING THE WRIT

The case involves the question, not yet precisely decided by the Court, whether the government may forbid homosexual activity between consenting adults in the privacy of the home, where there are no elements of force or involvement of minors.

The impact of statutes like G.S. 14-177 which forbid the crime of sodomy **/ is widespread and affects a substantial minority of citizens throughout the country. It has been estimated that there are from five to twenty million persons within the United States who either are homosexuals or have practiced homosexuality. The effect of such statutes which make it a crime to engage in homosexuality is to stigmatize those of homosexual preference, to be the cause of discrimination against them in a wide variety of circumstances,

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**/ Sodomy statutes exist in thirty-seven states.

and to result in their treatment as a despised minority.

The effect of statutes such as G.S. 14-177 is to invade in the most elementary sense the right of privacy protected by the Constitution and to do so in a way that serves no justifiable state interest. Sexual activity between consenting adults in private does not infringe upon anyone else's rights; nor is the suppression of such sexual activity justified by any reasonable, no less compelling, state interest.

A. G.S. 14-177 VIOLATES THE CONSTITUTIONAL RIGHT OF PRIVACY.

Petitioner was convicted of violating G.S. 14-177 because he performed fellatio with a consenting adult male in the absolute privacy of his home. The criminal prohibition and punishment of such absolutely private sex acts between consenting adults, is a violation of the right of privacy as guaranteed by the First, Third, Fourth, Fifth, Ninth and Fourteenth Amendments to the U.S. Constitution.

The decision below is inconsistent with this Court's decisions in Griswold v. Connecticut, 387 U.S. 479 (1965); Eisenstadt v. Baird, 405 U.S. 438 (1972), and Roe v. Wade, 410 U.S. 113 (1973). In these cases the Court recognized the right of privacy of married and unmarried people in sexual matters. In Eisenstadt the Court said "if the right of privacy means anything, it is the right of the individual, married

or single, to be free from unwarranted governmental intrusion into matters . . . fundamentally affecting a person . . ." , 405 U.S. at 453.

The factors set out in Eisenstadt in determining whether the right of privacy is invaded by the State are whether government intrudes into matters "fundamentally affecting a person" and whether that intrusion is unwarranted. As applied to petitioner, an acknowledged homosexual, GS 14-177 surely intrudes upon his fundamental interest in living and acting in accordance with his inherent sexual orientation because the statute proscribes essentially all the sexual activity performed by homosexuals. And it is clear that petitioner's life would be profoundly affected if he were forced to change sexual preference.

The expert testimony in this case demonstrates that the majority of experts agree that sexual preference is derived from either biological factors or environmental conditioning or a combination of both and would be extremely difficult and painful to reverse (R. 30, 31, 32). See, Sexual Inversion (J. Marmor, ed. 1965). As the same time, of course, as petitioner's expert witness testified, the life of homosexuals would be profoundly affected if they were forced to abstain totally from sexual expression. Experts agree that although humans certainly can abstain

from sexual activity, suppression of sexual expression is incompatible with personal happiness and mental health (R. 35).

There is then in this case a very strong presumption, recognized in Griswold, Eisenstadt and Roe, that petitioner's sexual preferences and activities warrant the highest degree of privacy. On the other hand, none of the legitimate state interests commonly invoked to support sodomy statutes--involvement of minors, use of force or commission of sexual acts in public--can be invoked in this case since it involves consenting activity between adults in private.

There are other justifications often given for outlawing private consensual adult homosexual conduct: protection of individuals, especially children, from sexual coercion; preservation of the traditional institution of heterosexual marriage; maintenance of a citizenry that can function well in society; guarding against an increase in homosexuality which may come with societal acceptance of homosexuality; guarding against conversion of individuals to homosexuality; guarding against the spread of "unnatural" sexual activities in society; and the guarding of public morality. But the extensive testimony of petitioner's expert, Mr. Klassen (R. 27-40), which is supported by other reliable sources proves that

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these justifications are factually unfounded and that the state therefore has no constitutional justification for enforcement of the sodomy statute in this case.

The American Law Institute has recognized the absence of a legitimate state interest which can justify invasion of the privacy rights of homosexuals and has recommended that all sexual practices which do not involve force, adult activity with minors, a public offense, be excluded from its Model Penal Code. See Sec. 207.5(1), Comment (Tent. Draft No. 4, 1955).

Invasion by the state of the fundamental right to privacy must rest upon a demonstration of a compelling state interest. None has been shown in this case, nor can the state make such a showing. In any case, the question presented is important, its effect is widespread, and it involves a federal question of substance not heretofore determined by this Court, and was decided below in a way probably not in accord with applicable decisions of this Court.

B. G.S. 14-177, ON ITS FACE AND AS APPLIED IN THIS CASE, VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

Although G.S. 14-177 prohibits all sexual activity between members of the same sex, and thereby denies petitioner the right to any sexual gratification whatever, heterosexuals in North Carolina may lawfully gratify their sexual needs in a great variety of ways. Since the statute therefore singles out homosexuals and prohibits their enjoyment of sex, it deprives petitioner and other homosexuals of the equal protection of the laws.

Discriminations involving "fundamental interests" or "suspect classifications" can be justified only if they are necessary to promote a compelling governmental interest; other classifications drawn by the state may be justified if they are substantially related to a legitimate state goal. Shapiro v. Thompson, 394 U.S. 618, 634 (1969). The former more stringent standard must be applied here because petitioner's private consensual sexual activities are fundamental interests protected by the right of privacy, Eisenstadt v. Baird, supra, and homosexuality which is the basis of the discrimination may be said to constitute a suspect classification. Under that test, the state has not and can not demonstrate a compelling interest to justify a total prohibition against all homosexual activity between consenting adults in private. Nor can the state even make the showing of mere rationality necessary under the more traditional equal protection text. But

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the justifications which would be put forward by the state in justification of the statute on equal protection grounds --under either test--would be the same as those described in Point A, supra, and no more compelling or rational here than they are there. The fact is that those justifications rest on undifferentiated apprehensions and myth, not on evidence, and cannot withstand any scrutiny, no less close scrutiny. See pp.6-9, supra.

C. THE G.S. 14-177 IS UNCONSTITUTIONALLY VAGUE IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

G.S. 14-177 proscribes the "crime against nature, committed with mankind or with a beast . . . ." This archaic, ill-defined terminology should be declared void-for-vagueness. As stated by the Supreme Court in Grayned v. City of Rockford, 408 U.S. 104, 108 (1972), citizens cannot ascertain how to "steer between lawful and unlawful conduct," and the absence of standards permits "arbitrary and discriminatory application."

Common law construction of the vague phrase, "crime against nature" does not cure its constitutional infirmity, for there are contradictory holdings of state courts as to whether fellatio is proscribed by "crimes against nature," "sodomy" and "buggery" statutes. Approximately two-

fifths of the courts dealing with this issue have held fellatio is not covered; three-fifths have held that it is. Barnett, Sexual Freedom and the Constitution, University of New Mexico Press (1973).

Every citizen should be "entitled to assume that some sex acts are licit; and, because the sex drive is an appetite common to all humankind, we can safely predict that just about everyone, at some point in life, will engage in some sexual acts. If a legislature is going to make certain of them illicit, we are entitled to a comprehensive description of them." Barnett, supra, at 18. The retention of vague, circumlocutive and archaic language is constitutionally objectionable for it allows for arbitrary and discriminatory enforcement and gives no guidance to citizens subject to it. Papachristou v. City of Jacksonville, 405 U.S. 156 (1972). Cf. Rose v. Locke, 44 U.S.L.W. 3301 (U.S. Nov. 17, 1975).

D. PETITIONER'S CONVICTION MUST BE REVERSED BECAUSE IT WAS THE PRODUCT OF A STATUTE WHICH IS SO ERRATICALLY AND ARBITRARILY ENFORCED, IT VIOLATES DUE PROCESS AND THE EQUAL PROTECTION OF THE LAWS.

Detective Hudson testified that he knew of other homosexuals in his jurisdiction but did not try to catch them in

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activities proscribed by G.S. 14-177. He testified that he was "out to get" Enslin, because Enslin used his homosexuality in connection with business (R. 16, 17). Mr. Enslin does not get paid in any way for his sexual activities, and did not do so in this case (R. 7). Further, the language of the statute does not proscribe the "crime against nature" only when money changes hands. This case presents the Court with an opportunity to declare that such arbitrary and erratic enforcement of state criminal laws is a violation of the Fourteenth Amendment. Yick Wo v. Hopkins, 118 U.S. 356 (1886). United States v. Cozart, 321 A. 2d 342 (D.C. 1974); United States v. Steele, 461 F. 2d 1148 (9th Cir. 1972); Moss v. Hoenig, 314 F. 2d 89 (2d Cir. 1963); People v. Utica Daw's Drug Co. 16 A. 2d 12 (1962).

CONCLUSION

For the reasons set forth above, the writ of certiorari should be granted.

Respectfully submitted,

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December 23, 1975

APPENDIX

Judgment and Order of the Supreme Court of North Carolina

In the

SUPREME COURT OF NORTH CAROLINA

Monday, August 25, 1975

No. 134PC

EUGENE ENSLIN,

Petitioner,

--v.--

THE STATE OF NORTH CAROLINA,

Respondent.

This matter came on to be considered upon petition for writ of certiorari to N.C. Court of Appeals to review its decision on the 25th day of August, 1975, by the Chief Justice and Associate Justices of the Supreme Court of North Carolina, to whom it appeared that the petition for writ of certiorari should be denied and that the appeal be dismissed ex mero

motu; the order for stay of execution of the judgment heretofore entered is hereby dissolved.

NOW, THEREFORE, it is ordered accordingly that the petition be denied and that the appeal be dismissed as aforesaid and certified to the Clerk of the North Carolina Court of Appeals; whereupon, it is considered and adjudged that the defendant and surety to the appeal bond, the Travelers Indemnity Company, do pay the costs incurred, to wit: the sum of NINE AND NO/100 ($9.00) Dollars, and that execution issue therefor.

Witness my hand and official seal, this the 25th day of August, 1975.

Adrian J. Newton
Clerk of the Supreme Court of
North Carolina

By: John R. Morgan
Assistant Clerk

Opinion of the North Carolina

Court of Appeals

In the

NORTH CAROLINA COURT OF APPEALS

Wednesday, May 14, 1975

No. 754SC90

Appeal by defendant from Webb, Judge. Judgment entered 26 September 1974 in Superior Court, Onslow County. Heard in the Court of Appeals 9 April 1975.

By bill of indictment proper in form defendant was charged with committing " . . . the abominable and detest-

able crime against nature with Herbert P. Morgan, a male person . . . . " Before pleading, defendant moved to quash the indictment and for a dismissal of the prosecution on the ground that the indictment is unconstitutional.

The court reserved its ruling on the motion to quash but later overruled it. Defendant pleaded not guilty, a jury found him guilty as charged, and from judgment imposing prison sentence of one year, defendant appealed.

Attorney General Edmisten, by Assistant Attorney General Edwin M. Speas, Jr., for the State.

Smith, Carrington, Patterson, Follin & Curtis, by Norman B. Smith, and Marilyn G. Haft (by brief), for defendant appellant.

BRITT, Judge. By his sole assignment of error, defendant contends the court erred in denying his motions to quash the indictment, dismiss the action, and for nonsuit on the ground that the statute under which he was indicted, G.S. 14-177, is unconstitutional, in that it violates the First, Third, Fourth, Ninth and Fourteenth Amendments to the Federal Constitution. We find no merit in the assignment.

In State v. Crouse, 22 N.C. App.

47, 205 S.E. 2d 361 (1974), and State v. Moles, 17 N.C. App. 664, 195 S.E. 2d 352 (1973), this court upheld the constitutionality of G.S. 14-177. We reaffirm our rulings in these cases and again hold that the subject statute is constitutional.

No error.

Judges HEDRICK and MARTIN concur.

Order of the Superior Court, Onslow County, North Carolina

In the

GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

Thursday, October 10, 1974

No. 74 CR 10447

This cause coming on to be heard and being heard by the undersigned Judge holding the September 23, 1974 criminal term of the Superior Court on Onslow County, the defendant having been convicted at the said term of a violation of G.S. 14-177; the Court having reserv-

ed ruling on the defendant's motions to quash the bill of indictment and to dismiss the State's case at the end of the evidence for the State and at the end of all the evidence; and the court, with the consent of the State and defendant, having heard evidence offered by the defendant and oral arguments by the defendant's attorneys and the District Attorney at Kenansville, North Carolina, on October 4, 1974, and having considered a written brief filed by the defendant; and the Court being of the opinion that the motions of the defendant should be overruled;

IT IS NOW THEREFORE ORDERED that the defendant's motions to quash the indictment and to dismiss the case as of nonsuit at the end of the State's evidence and at the end of all the evidence are overruled.

This 10th day of October, 1974

JOHN WEBB
Judge of the Superior Court.

To the entry of the foregoing order the defendant excepts.

JOHN WEBB
Judge of the Superior Court